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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 248

SCHWEGMANN BROTHERS GIANT SUPER MARKET, ET AL.,

Petitioners,

versus

ELI LILLY & COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOHN MINOR WISDOM,
SAUL STONE,
PAUL O. H. PIGMAN,
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Counsel for Petitioners.

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SCHWEGMANN BROTHERS GIANT SUPER MARKET, ET AL.,

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ELI LILLY & COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petition of Schwegmann Brothers Giant Super Market, a commercial partnership composed of John Schwegmann, Jr., Paul Schwegmann, Wilfred I. Meyer, Anthony Schwegmann, Charles Acquistapace, Ernest Barrios, and O'Neil Barrios, and of the individual partners, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on June 30, 1953.

OPINIONS BELOW

The opinion of the District Court (109 F. Supp. 269) and the majority and dissenting opinions of the Court of Appeals for the Fifth Circuit (not yet reported) are printed in the record (R. 96, R. 117, R. 125).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

STATUTES INVOLVED

The pertinent statutes are the Louisiana Fair Trade Law, La. R.S. 51:391-396 (Appendix A), and the so-called Federal Fair Trade Law or McGuire Act, 15 U.S.C. § 57 (Appendix B).

QUESTION PRESENTED

The question presented here is the constitutionality and enforceability of fair trade price fixing sought to be imposed on nonsigners in transactions affecting interstate commerce.

DIVISION OF THE QUESTION.

The question may be divided as follows:

(1) As to the Louisiana Fair Trade Law—

(a) Is the delegation of price-fixing power to private persons, where there are no legislative standards and no administrative safeguards for the protection of the coerced nonsigner and the public, a

violation of the due process clause of the Fourteenth Amendment? U. S. Const., Amend. XIV.

(b) Does fair trade price fixing have a sufficiently substantial relation to the public welfare to come within a state's police power? U. S. Const., Amend. XIV.

(c) Does fair trade price fixing impose an unlawful burden on interstate commerce? U. S. Const., Art. I, § 8.

(2) As to the McGuire Act—

(a) Is price fixing a legislative function that cannot be delegated? U. S. Const. Art. I, § 1.

(b) If price fixing is delegable, is the delegation of price-fixing power to private persons, especially where there are no legislative standards and no administrative safeguards to protect the coerced nonsigner and the public, a violation of the due process clause of the Fifth Amendment? U. S. Const., Amend. V.

(c) If, as respondent contends, the effect of the McGuire Act is to grant to private persons (or to the states which redelegate) the power to fix prices of substantially all trademarked, branded, or named goods moving in interstate commerce, is it not such a surrender of the congressional power over commerce that it offends the commerce clause? U. S. Const., Art I, § 8. If, as respondent also contends, the effect of the McGuire Act is that it is only an enabling statute, is it authority for fair traders to fix prices in interstate commerce where the state has not enacted any enabled legislation to take advantage of the McGuire Act?

(3) Where the market effect of the nonsigner clause is to bring about horizontal price fixing, is such price fixing enforceable—in view of the statutory prohibitions of the Louisiana Fair Trade Law, the McGuire Act, and the Sherman Act against horizontal price agreements? Is not the language of the Fair Trade Law and the McGuire Act contradictory and self-defeating?

STATEMENT OF THE CASE

This case involves the price of insulin, a drug necessary to keep diabetics alive. A diabetic pays $2.08 for a small bottle of Lilly's insulin at Schwegmann's, $2.83 for an identical bottle at fair trade prices. 75 cents on each small bottle of insulin, therefore, to the diabetic expresses the difference between free and open competition as it has developed in this country and horizontal price fixing under the Louisiana Fair Trade Law and the McGuire Act.

The Louisiana Fair Trade Law is typical of fair trade statutes in forty-five states. It has two main provisions. The contract clause provides that a contract relating to the sale of a commodity bearing a trademark, brand, or name shall not be invalid because of resale price-fixing provisions. The nonsigner clause binds noncontracting retailers by making them liable if, knowingly, they sell fair-traded goods below the fixed fair trade price.[1] Under the Louis-

[1] Recently courts of last resort in Florida, Michigan, Georgia, and Tennessee have held state nonsigner clauses invalid or unenforceable. Seagram-Distillers Corp. v. Ben Greene, Inc., 54 So.2d 235 (Fla. 1951); Shakespeare Co. v. Lippman's Sporting Goods Co., 334 Mich. 109, 54 N.W.2d 268 (1952); Grayson-Robinson Stores,

iana law, a private person (a manufacturer, distributor, wholesaler, or any person—even a dealer unauthorized by the owner of the trademark, brand, or name) may fix the price for the entire retail level by entering into a contract with one retailer. Such price fixing by private persons is free of supervision by any state or federal agency. There are no administrative or regulatory safeguards in the law to protect the public or the coerced retailer against the unreasonableness of the price fixing. The closest the statute comes to establishing a standard is the statement that a fair-traded commodity must be in fair and open competition with commodities of the same general class, a provision that does not touch the essence of competition—competition in pricing.

On principle, John Schwegmann refuses to sign fair trade contracts. He and the other petitioners are the same litigants who appealed to this Court that the Miller-Tydings amendment to the Sherman Act did not exempt from the antitrust laws resale price maintenance imposed on unwilling nonsigners. *Schwegmann Brothers v. Calvert Distilling Corp.*, 341 U. S. 384 (1951).

The McGuire Act, the so-called Federal Fair Trade Law,[2] was designed to circumvent the *Schwegmann* case. It provides that nothing contained in any of the federal

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Footnote No. 1—Continued:
Inc. v. Oneida, Ltd., 75 S.E.2d 161 (Ga. 1953) Calvert Distillers Corporation v. Robilio, CCH Trade Reg. Rep. ¶ 67,540 (Tenn. 1953) (interstate transactions); *cf.* Liquor Stores, Inc. and Webb's City, Inc. v. Continental Distilling Corp., 40 So.2d 371 (1949), holding a prior Florida fair trade law unconstitutional. A lower New Jersey court has reached the same conclusion. Lionel Corp. v. Grayson-Robinson Stores, Inc., CCH Trade Reg. Rep., ¶ 67,539 (N.J. Super. 1953).

[2] Although the McGuire Act is not a fair trade act in the same sense as the state laws, it is referred to in the reporting services and in some law reviews as the Federal Fair Trade Law. CCH Trade Reg. Rep. (1953).

antitrust laws shall render unlawful any fair trade contract or the enforcement of any right under a fair trade contract, whether a party to the contract or a nonsigner is involved. It provides also that neither the making nor enforcement of fair trade contracts shall constitute an unlawful burden on interstate commerce.

John Schwegmann and his partners have two supermarkets in New Orleans. Because of an efficient operation, location of their main store on the outskirts of the city, a volume business on a self-service cash-and-carry basis, and hard work by the owners themselves, petitioners are able to reduce their costs. Petitioners employ a small but uniform mark-up. The effect of this business policy is to pass on the fruits of efficiency to the buying public in the form of lower prices.[3] The effect is to provide a store where goods are merchandised with minimum services, at prices keyed to costs. The diabetic who cannot afford to pay—in the form of higher prices—for a retailer's credit department, delivery service, elaborate furnishings, high-rental location, and air-conditioning, can forego these merchandising luxuries and buy at Schwegmann's. No predatory practice is involved here.[4]

Respondent, Eli Lilly and Company, sued for an injunction to restrain Schwegmann's from selling Lilly's

[3] "It was established also that the appellants had a uniform mark-up, employed no loss leaders, and indulged in no otherwise predatory practices." Opinion of the Court of Appeals (R. 118).

[4] "There is no suggestion in the record, nor in the pleadings, that defendants are using the plaintiff's products as 'loss-leaders.' The evidence is uncontradicted that defendants made a fair profit on all sales of plaintiff's products below the fair trade price. . . . The defendants simply are efficient retailers who pass on the fruits of that efficiency to the buying public in the form of lower prices." Opinion of the District Court. (R. 98.)

insulin, streptomycin, penicillin, and vitamin concentrates at less than fair trade prices. Lilly is a large manufacturer of drugs. The products of Lilly and its national competitors comprise the great bulk of drugs moving in interstate commerce. Lilly's policy is to control the price of its products at every resale level through fair trade price fixing. Lilly's prices in Louisiana are part of a nationwide integrated pricing scheme; prices are uniform throughout the country, except for variations attributable to local taxes. (R. 84-85.)

It is undisputed that sales of the goods in this case affect interstate commerce. (R. 79.)

The District Court granted an injunction in favor of respondent, principally on the authority of *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*, 299 U. S. 183 (1936), and *Prudential Insurance Co. v. Benjamin*, 328 U. S. 408 (1946). A majority of the Court of Appeals affirmed the District Court. Judge Holmes of the Court of Appeals wrote a vigorous and compelling dissent, holding the Louisiana Fair Trade Law unconstitutional "insofar as it imposes price-fixing agreements upon persons who are not parties to a fair trade contract." In Judge Holmes' view, *Old Dearborn* is obsolete, inapplicable, and unsound. This is petitioners' view, too.

REASONS FOR GRANTING WRIT

A

The Court's decision in this litigation affects the pocketbook of every consumer in the country, the merchandising methods of most retailers, the political philosophy and economic thinking of every citizen.

The nonsigner clause, as now buttressed by the McGuire Act, delegates to private persons unregulated price-fixing authority, even over interstate commerce. The extent to which such delegation is consistent with the constitution and responsible government concerns every American citizen.

Fair trade strikes at distinctively American ideas: the Sherman Act philosophy of competition as essential to democracy; the little man's faith in individual initiative; the American ideal of continually rising standards of living achieved by merchandising economies passed on to consumers; the written constitution as a shield against overreaching legislation.

The needy diabetic who would like to save 75 cents on a small bottle of insulin has a direct interest in the outcome of this case. But in one sort of goods or another, all consumers have a similar and equally direct interest. Fair traders fix the prices of foods, drugs, clothing, and other necessities of life. If this form of price fixing were valid, fair traders, up to now wary of interstate commerce, would

be able to fix the prices of most goods moving in interstate commerce. "What a tangled web this would be!" [5]

The decision in this case will determine whether a vast segment of our economy will have the benefit of free enterprise or whether it will be sheltered from competition by price fixing. The decision will either sanction or condemn the merchandising methods of thousands of independent merchants who, by efficient management or by operation of a minimum service business, are able to reduce their costs and pass on corresponding savings to consumers. The decision will either stimulate or deter price fixing by thousands of manufacturers and distributors. The decision will have an immediate and continuing effect on the millions of consumers in fair trade states, who today are paying more for the goods they buy than they would pay for the goods in a free competitive market.

The market effect of the nonsigner clause is to bring about horizontal price fixing far more effectively than could be accomplished by a horizontal agreement or conspiracy among dealers on the same level. A producer or distributor can find one willing retailer in Louisiana and, against the wishes of all the other retailers, impose horizontal pricing on the entire retail level, enforced by orders of state and federal courts. The independent self-employer who has a combination gas station and general store at a little cross-roads settlement like Bayou Lacombe

[5] "If distillers and drug manufacturers may make consensual vertical price fixing agreements with retailers that are binding on nonsigners, there are plenty of trade-marked breakfast foods, canned goods, and other edible commodities, the producers of which might blanket the nation with vertical minimum-price-fixing agreements. What a tangled web this would be!" Dissenting opinion, Court of Appeals. (R. 138.)

is at the mercy of some producer in New York or some drug chain in New Orleans. He is a victim of a statute entitled "Fair Trade" that in terms condemns price fixing by horizontal agreements.

This Court is not asked to pass on the wisdom of the Louisiana Fair Trade Law or of the Federal Fair Trade Law. Petitioners' arguments rest on solid legal grounds. The case has ulterior significance, however, inextricably bound with the purely legal issues, that addresses itself to the question of the importance of granting a writ of certiorari. That significance is the critical effect of the decision on a free economy and the relation of a free economy to a constitutional democracy.

B

The opinion below decided important questions of federal law which have not been, but should be, settled by this Court.[6] These are (1) the constitutionality of a state fair trade law in the light of the *Schwegmann* decision and (2) the constitutionality of the important McGuire amendment to the federal antitrust laws.

C

In upholding the constitutionality of the Louisiana Fair Trade Law, the court below relied on *Old Dearborn*. It is submitted that reliance on *Old Dearborn* was erroneous:

(1) *Old Dearborn* did not consider the constitutional issues *as raised in this litigation*. The rationale

[6] The controlling opinions in both courts below, and the strong dissent, invite this Court to reexamine the issues in this litigation. (R. 102; R. 124.) *Cf.* Calvert Distillers Corporation v. Robilio, CCH Trade Reg. Rep., ¶ 67,540 (Tenn. 1953), in which Tennessee's court of last resort refused to enforce fair trade price fixing in transactions affecting interstate commerce until this Court should pass on the McGuire Act.

of *Old Dearborn* is that a fair trade law is not a price-fixing statute; that the retailer *assents* to "permissive" price fixing—actually, by entering into a fair trade contract, or impliedly, if a nonsigner, by purchasing goods known to be fair-traded. Some fifteen years later, the *Schwegmann* case brought the nonsigner provision out of the never-never land of make-believe into the land of reality. In this later decision the court decided that the Louisiana Fair Trade Law "is not price fixing by contract or agreement" but "is price fixing by compulsion." 341 U. S. at 388. Fair traders resort to coercive price fixing, "whereby recalcitrants are dragged in by the heels and compelled to submit to price fixing." 341 U. S. at 390. Testing fair trade resale price maintenance as coercive price fixing and testing it as consensual pricing are two different things. There is no question of improper delegation or lack of due process, if a nonsigner is regarded as assenting to resale price maintenance.

(2) *Old Dearborn* did not consider the constitutional question of improper delegation based on the delegation of a legislative function to private persons and on the lack of legislative standards and administrative safeguards.[7] *Schechter Poultry Corp. v. United States*, 295 U. S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U. S. 388 (1934); *Carter v. Carter Coal Co.*, 298 U. S. 238 (1936); *Yakus v. United States*, 321 U. S. 414 (1944). *Old Dearborn's* failure to consider this constitutional question, as raised in this case, was a corollary to its assumption that a nonsigner impliedly assents to resale price fixing.

[7] Neither did the Louisiana Supreme Court, in upholding the validity of the Louisiana Fair Trade Law as to intrastate commerce, consider the question of improper delegation under Article III, Section 1 of the Louisiana Constitution. Pepsodent Co. v. Krauss Co., 200 La. 959, 9 So.2d 303 (1942).

(3) *Old Dearborn* assumes that good will is necessarily incident to a trademark or brand name and is an interest in property sufficient to justify the owner[8] of the trademark fixing resale prices after the property has passed into other hands. This is contrary to all trademark law and is contrary to decisions of this Court. See *Champion Spark Plug Co. v. Sanders,* 331 U. S. 125, 129 (1947). It is a kind of a mysterious covenant running with a chattel, a form of property unknown to Anglo-American law. On this major point, the decision of the court below is, on principle, contrary to the decision of the Court of Appeals for the Third Circuit in *Sunbeam Corp. v. Wentling,* 192 F.2d 7 (3d Cir. 1951). Referring to *Old Dearborn,* Judge Goodrich held that the owner of a trademark could not fix resale prices; that the right of a trademark owner is only to prevent one palming off the trademarked goods as his own; that it is against the law in many cases[9] and an empty right in many other cases to suggest that the trademark or brand name may be removed (for example, removal of the name "Bayer" from asprin tablets); that the trademark owners's or

[8] Under the Fair trade laws of Louisiana and some 20-odd other states, *any* person is in effect authorized to fix resale prices, even without the knowledge or consent of the owner of the trademark, brand or name. See, *e.g.*, La. R.S. 51:391 *et seq.* For a compilation of state law provisions, see CCH Trade Reg. Rep. ¶ 7011; for a discussion of the rights of those other than trademark owners to fix prices, see CCH Trade Reg. Rep. ¶ 7176; Schachtman, Resale Price Maintenance and the Fair Trade Laws, 11 U. Pitt. L. Rev. 562, 573 (1950).

[9] As was stated by Judge Holmes in his dissenting opinion below:
"Without mentioning the practical impossibility of removing the trade mark from all aspirin tablets and from all the containers of drugs in stock, there are state and federal statutes forbidding the obliteration or concealment of trade marks, and even requiring the display of the manufacturer's, packer's, or distributor's name on drugs. 27 U.S.C. 205(e); 21 U.S.C. 331, 352. 21 U.S.C. 352(a) says: 'A drug shall be deemed misbranded if its labeling is false or misleading in any particular,' . . . or 352(1)(3) 'if it is offered for sale under the name of another drug.'" (R. 137).

manufacturer's "rights under the fair trade act against a non-signer are shown by the decision in the *Schwegmann* case. There are no such rights." 192 F.2d at 9. The purpose of fair trade, as is evident from the statute and experience over twenty years, was not to protect good will incident to a trademark, but to protect the inefficient or high cost retailer. This, at the expense of the efficient or minimum service retailer, to say nothing of the consumer. The statute should be tested in the light of what it is, not in the light of what it is not.

(4) *Old Dearborn* did not consider the constitutional question, as raised in this case, of the relation of fair trade price fixing to the police power and the due process clause, since the court below did not regard the Illinois fair trade law as a *price-fixing* statute. See *Nebbia v. New York*, 291 U. S. 502 (1933); *Liquor Stores, Inc. v. Cont. Distilling Corp.*, 40 So.2d 371 (Fla. 1949); *Schwegmann Bros. v. La. Board of Alcoholic Beverage Control*, 216 La. 148, 43 So.2d 248 (1949); *Grayson-Robinson Stores, Inc. v. Oneida, Ltd.*, 75 S.E.2d 161 (Ga. 1953).

(5) *Old Dearborn* did not consider the question of fair trade as an undue burden on interstate commerce. Subsequent to *Old Dearborn* but prior to *Schwegmann*, the Court of Appeals for the Third Circuit held that a fair trade law is an unlawful burden on interstate commerce. *Sunbeam Corp. v. Wentling*, 185 F.2d 903 (3rd Cir. 1950). The question is one for determination by the judiciary.[10]

[10] Although Congress may state its conclusion, as in the McGuire Act, that specified acts shall not "constitute an unlawful burden or restraint upon, or interference with, commerce," the determination of what is in fact a burden upon commerce can only be made by the courts on the basis of Article I, Section 8 of the Constitution. The legislative cannot usurp the function of the judiciary.

Summarizing, the *Old Dearborn* case misconceived the purpose of fair trade, adopted a rationale now repudiated, and did not consider the constitutional issues as raised in this cause. If *Old Dearborn* has not been overruled, at least the *Schwegmann* case has opened the door for a re-examination of fair trade as "coercive price fixing," subject to the constitutional limitations imposed on any other price fixing.

D

The McGuire Act is either a delegation of authority or it is not.

If, as respondent contended below, the McGuire Act gives private persons the uncontrolled authority to fix the prices of all trademarked or branded goods moving in interstate commerce, binding noncontracting parties, it is an unlawful delegation of federal legislative power.[11] U. S. Const., Art. I, § 1.

It is so great a surrender of the congressional commerce power that it is prohibited by the force of the commerce clause alone. U. S. Const. Art I, § 8. Petitioners submit that *Prudential Ins. Co. v. Benjamin*, 328 U. S. 408, did not contemplate such a surrender.

If, as respondent also contended below, the 1952 McGuire Act is simply an enabling act for state legislation—where is the enabled legislation? The enabled statute cannot be a fair trade law adopted in 1936 which, to be given a constitutional effect, must be interpreted (when

[11] "Old Dearborn, of course, did not consider the challenges which are addressed to the McGuire Act." Opinion of the Court of Appeals (R. 124).

enacted) as having only an intrastate application. If, for purposes of argument, the assumption is accepted that the McGuire Act is enabling legislation only, the Act is ineffective in itself as a grant of power over interstate commerce. It does not even purport to grant any power over commerce to states or individuals, but only gives immunity for what would otherwise be a violation of federal antitrust laws.

E

Litigation under the McGuire Act involving resale price maintenance against nonsigners is mushrooming throughout the United States.[12] The litigation raises questions posed in this petition. Manufacturers, retailers, and consumers in all 48 states are waiting anxiously for this Court to settle the vital issues now before it in this case. Confusion will persist until these issues are finally determined.

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[12] See, *e.g.*, Sunbeam Corp. v. MacMillan, CCH Trade Reg. Rep. ¶ 67,451 (U.S.D.C. Md. 1953); Sunbeam Corp. v. Payless Drug Stores, CCH Trade Reg. Rep. ¶ 67,492 (U.S.C.D. Cal. 1953); Shakespeare Co. v. Lippman's Sporting Goods Co., 334 Mich. 109, 54 N.W.2d 268 (1952); Hoffman-LaRoche, Inc. v. Weissbard, 11 N.J. 541 (1953); Grayson-Robinson Stores, Inc. v. Oneida, Ltd., 75 S.E. 2d 161 (Ga. 1953); Cal-Dak Co. v. Sav-on Drugs, 254 P. 2d 497 (Calif. 1953); Calvert Distilling Corporation v. Robilio, CCH Trade Reg. Rep. ¶ 67,540 (Tenn. 1953); Federal Cartridge Corp. v. Helstrom, CCH Trade Reg. Rep. ¶ 67,366 (Ore. Cir. 1952); Sunbeam Corp. v. Central Housekeeping Mart, Inc., CCH Trade Reg. Rep. ¶ 67,379 (Ill. Super. 1952); Seagram-Distillers Corp. v. Block, CCH Trade Reg. Rep. ¶ 67,381 (Md. Cir. 1952); General Electric Co. v. S. Klein on the Square, Inc., CCH Trade Reg. Rep. ¶ 67,443 (N.Y. Sup. 1953); Raxor Corp. v. Goody, CCH Trade Reg. Rep. ¶ 67,462 (N.Y. Sup. 1953); Elgin National Watch Co. v. Druxman, CCH Trade Reg. Rep. ¶ 67,498 (Wash. Super. 1953); Lionel Corp. v. Grayson-Robinson Stores, Inc., CCH Trade Reg. Rep. ¶ 67,529 (N.J. Super. 1953).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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EDWARD B. BENJAMIN, JR.
Counsel for Petitioners.

CERTIFICATE.

This is to certify that copies of this petition have been served on counsel for respondent on the .... day of August, 1953.

APPENDIX A

Louisiana Fair Trade Law

Act No. 13, Louisiana Acts of 1936; now codified as §§ 391 to 396, inclusive, of Title 51, Louisiana Revised Statutes of 1950.

An Act to protect trade mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trade mark, brand or name.

§ 391. *Producer and commodity defined*

As used in this Sub-part:

"Producer" means grower, baker, maker, manufacturer, or publisher.

"Commodity" means any subject of commerce.

§ 392. *Contracts restricting resale price valid*

No contract, relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer of the commodity and which is in fair and open competition with comodities of the same general class produced by others, shall violate any law of this state by reason of any of the following provisions which may be contained in the contract:

(1) That the vendee shall not resell the comomdity at less than the minimum price stipulated by the vendor;

(2) That the vendee or producer require in delivery to whom he may resell the comomdity, an agreement that the second vendee will not, in turn, resell at less than the minimum price stipulated by the vendor or by the vendee.

§ 393. *Exceptions to contracts*

The provisions authorized in a contract by R.S. 51:392 shall not apply in the following cases:

(1) In closing out the owner's stock for the purpose of discontinuing delivery of the commodity;

(2) When the goods are damaged or deteriorated in quality, and notice is given to the public;

(3) Where an officer is acting under the orders of court.

§ 394. *Breach of contract; unfair competition*

Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the minimum price stipulated in any contract entered into pursuant to the provision of R.S. 51:392, whether the person so advertising, offering for sale, or selling is or is not a party to the contract, is unfair competition and is actionable by any person damaged.

§ 395. *Exemptions*

This Sub-part shall not apply to any contract between producers, or between wholesalers, or between retailers as to sale or resale prices.

§ 396. *Name of Sub-part*

This Sub-part may be cited as "Fair Trade Law."

APPENDIX B

McGuire Act

Public Law 542, Act of July 14, 1952, 82d Cong. 2d Sess. (H. R. 5767), 66. Stat. 631.

An Act to amend the Federal Trade Commission Act with respect to certain contracts and agreements which establish minimum or stipulated resale prices and which are extended by State law to persons who are not parties to such contracts and agreements, and for certain other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

It is the purpose of this Act to protect the rights of States under the United States Constitution to regulate their internal affairs and more particularly to enact statutes and laws, and to adopt policies, which authorize contracts and agreements prescribing minimum or stipulated prices for the resale of commodities and to extend the minimum or stipulated prices prescribed by such contracts and agreements to persons who are not parties thereto. It is the further purpose of this Act to permit such statutes, laws, and public policies to apply to commodities, contracts, agreements, and activities in or affecting interstate or foreign commerce.

Sec. 2. Section 5 (a) of the Federal Trade Commission Act, as amended, is hereby amended to read as follows:

"Sec. 5. (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

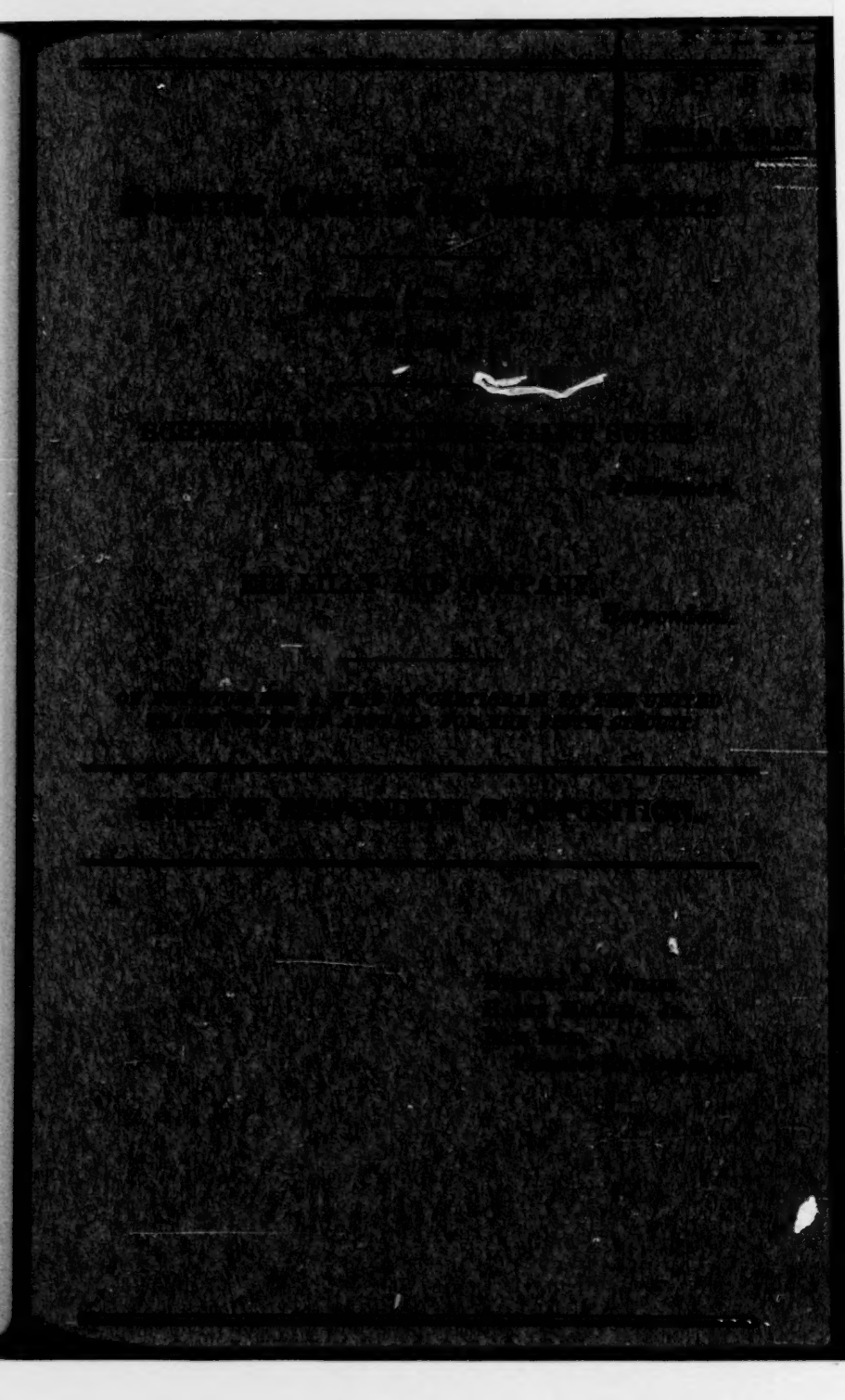
"(2) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

"(3) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

"(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce.

"(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

"(6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938, and persons, partnerships, or corporations subject to the Packers and Stockyards Act, 1921, except as provided in section 406 (b) of said Act, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 248

SCHWEGMANN BROTHERS GIANT SUPER MARKETS, *et al.*,
Petitioners,

vs.

ELI LILLY AND COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION.

The decision below affirmed a judgment granting the respondent an injunction under the Louisiana Fair Trade Law* on the basis of the following undisputed facts: that the respondent had established fair trade minimum prices for its products by contracts entered into in accordance with the Louisiana Fair Trade Law (R. 4-5, 52-53); that respondent's products are in fair and open competition with commodities of the same general class produced by others (R. 5-8, 53); and that the petitioners, although not signers of such a contract, wilfully and knowingly disregarded in their retail sales in Louisiana the fair trade minimum prices established under fair trade contracts between the respondent and other Louisiana retailers, thus admittedly engaging

* Louisiana Revised Statutes of 1950, Title 51, §§391-396.

in the conduct declared by the Louisiana Fair Trade Law to be actionable unfair competition and found by the Court below to threaten irreparable injury to respondent (R. 9-20, 54, 55, 105).

Opinions Below.

The opinions of the Court of Appeals for the Fifth Circuit (R. 117-138) are not yet reported. The majority opinion was joined in by Circuit Judges Rives and Strum. The dissenting opinion was by Circuit Judge Holmes. The opinion of the United States District Court for the Eastern District of Louisiana (R. 96-104) is reported at 109 F. Supp. 269.

Jurisdiction.

The petitioners have invoked the jurisdiction of this Court under 28 U. S. C. §1254(1).

Questions Presented.

Although the petition sets forth one question broken down into numerous and overlapping subdivisions, upon analysis the petition presents the following three questions:

1. Does the Fourteenth Amendment prevent a state from enacting a fair trade statute of the character which has been enacted by the legislatures of forty-five states?

2. Can Congress constitutionally consent, as it has done in the McGuire Act,* to the full and effective operation of state fair trade laws insofar as they affect interstate commerce?

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*Public Law 542, Act of July 14, 1952, 82d Cong. 2d Sess., H. R. 5767, 66 Stat. 631.

3. Are the Louisiana Fair Trade Law and the McGuire Act to be denied enforcement by the courts on the ground that fair trade prices established by "vertical" contracts, when enforced against non-signers with notice as expressly authorized by such statutes, allegedly have the same "market effect" as contracts between retailers from which such statutory authorization is withheld?

Reasons for Denying the Writ.

The petition does not meet any of the criteria for certiorari specified in this Court's Rule 38. For the most part the petition presents not questions of law but questions of economics which were properly to be addressed—and were in fact addressed by these same petitioners and others—to the State legislature and to Congress which rejected them. The constitutional questions sought to be raised by the petition have been settled by this Court; the one non-constitutional question is frivolous; and there is no conflict between the decision below and any decision of any other Court of Appeals. The petition presents no question warranting review by this Court.

The petitioners' claim that the Louisiana Fair Trade Law is contrary to the Fourteenth Amendment is disposed of by

(a) the unanimous decision of this Court in *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp.*, 299 U. S. 183 (1936);

(b) the decisions of the Louisiana Supreme Court and the highest courts of fourteen other states that the fair trade laws do not deny constitutional due process of law; and

(c) the repeated decisions of this Court that the economic and social wisdom of a statute are matters

for legislative determination and that this Court will not substitute its judgment for that of the legislatures on such questions.

The petitioners' claim of unconstitutionality of the McGuire Act is disposed of by the long line of Commerce Clause cases culminating in *Prudential Insurance Company* v. *Benjamin*, 328 U. S. 408 (1946).

ARGUMENT.

1. The Constitutionality of the Louisiana Fair Trade Law Is Settled by Decisions of This Court.

A. The Petitioners' Fourteenth Amendment Arguments Were Considered and Rejected in the *Old Dearborn* Case.

This Court settled the precise questions which the petition seeks to raise as to the constitutionality of a state fair trade law in *Old Dearborn Distributing Company* v. *Seagram-Distillers Corp.*, 299 U. S. 183 (1936). In that case the Court specifically considered and rejected the claims that the Illinois Fair Trade Law (identical in all material respects with the Louisiana Fair Trade Law) violated the Fourteenth Amendment because (a) it did not bear a "substantial relation to the public welfare" (299 U. S. at pp. 191-193) and (b) it delegated legislative power to private individuals (299 U. S. at p. 194). The Court also rejected the same challenges to both the Illinois and California fair trade statutes in companion cases decided at the same time. *McNeil* v. *Joseph Triner Corp.*, 299 U. S. 183 (1936); *Kunsman* v. *Max Factor & Co.*, 299 U. S. 198 (1936); and *The Pep Boys, Manny, Moe & Jack of California, Inc.* v. *Pyroil Sales Co., Inc.*, 299 U. S. 198 (1936).

The petitioners' assertion that *Old Dearborn* did not consider the delegation question is simply contrary to fact. The Court expressly held that there was "nothing in this situation to justify the contention that there is an unlawful delegation of power to private persons" (299 U. S. at p. 194) although exactly the same cases cited on this point in the present petition were cited in the briefs in the *Old Dearborn* case*. The cases referred to, all decisions by the same Court only a short time before the *Old Dearborn* decision, were rejected by this Court as a basis for holding the fair trade laws unconstitutional.

The petitioners' sole ground for questioning the authority of the *Old Dearborn* case is an assertion that this Court in *Schwegmann Brothers* v. *Calvert Distillers Corp.*, 341 U. S. 384 (1951) "opened the door" for a re-examination of *Old Dearborn* as a determination of the validity of state fair trade laws under the Fourteenth Amendment. But the *Schwegmann* case related solely to the interpretation of the Sherman and Miller-Tydings Acts; the case did not deal with or refer to, expressly or impliedly, a single question or principle of constitutional law. As the Court below in the present case pointed out (R. 120-121):

> "In comparing the two opinions [*Old Dearborn* and *Schwegmann*], it must be borne in mind that *Old Dearborn* was dealing with the questions of constitutionality, whereas the Schwegmann case was dealing only with statutory interpretation. There is no implication in Schwegmann that Congressional approval of enforcement against non-signers would

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* *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495 (1935); *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935); *Carter* v. *Carter Coal Co.*, 298 U. S. 238 (1936).

be unconstitutional, the implications of the opinion are to the contrary."*

The petitioners assert that *Old Dearborn's* holding can now be questioned because this Court did not then regard fair trade laws as "price-fixing" statutes or as compulsive on non-signers but regarded them as "permissive" legislation under which non-signers assented to be bound, whereas the *Schwegmann* case characterized fair trade laws as involving "price-fixing" and as binding non-signers by compulsion.

The petitioners' assertion is without foundation. There is no inconsistency either in result or in language between the *Old Dearborn* and *Schwegmann* decisions. *Old Dearborn* held that a state statute compelling observance of fair trade prices by both signers of fair trade contracts and non-signers with notice did not offend any constitutional provision. *Schwegmann* merely held that the removal by

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* The Court below quoted the following passages from this Court's opinion in the *Schwegmann* case as implying that Congress could constitutionally consent to enforcement against non-signers (R. 121):

> "The fact that a state authorizes the price fixing does not, of course, give immunity to the scheme, *absent approval by Congress.*" (341 U. S. at p. 386.)
>
> "*Had Congress desired* to eliminate the consensual element from the arrangement and to permit blanketing a state with resale price fixing if only one retailer wanted it, we feel that different measures would have adopted—*either a nonsigner provision would have been included or resale price fixing would have been authorized without more.*" (341 U. S. at p. 390.)
>
> "It should be remembered that it was the state laws that the federal law was designed to accommodate. Federal regulation was to give way to state regulation. When state regulation provided for resale price maintenance by both those who contracted and those who did not, and the federal regulation was relaxed only as respects 'contracts or agreements', the inference is strong that *Congress left the noncontracting group to be governed by preexisting law.*" (341 U. S. at p. 395.) (Emphasis supplied by the Court below.)

Congress of the Sherman Act barrier to enforcement of such statutes had been limited to signers of contracts (since the Miller-Tydings Act made no reference to non-signers) and that enforcement must be limited accordingly unless and until Congress should consent to enforcement against non-signers. The petitioners do not deny that Congress has now given that consent in the McGuire Act.

Old Dearborn made no assumption that the fa. trade laws had no "price-fixing" aspects or that there was any actual consent by non-signers to be bound. It expressly recognized that a non-signer's obligation to observe the fair trade prices was imposed by force of the state statute (299 U. S. at pp. 192-194). The question dealt with was whether, in the absence of actual consent, the Illinois statute went beyond the bounds of reasonableness and therefore violated the due process clause.

This Court held that it did not. The Court pointed out that the statute applied to a non-signer only when he purchased trade-marked or branded goods with full knowledge of the minimum price restriction imposed and then proceeded wilfully and knowingly to disregard it. The Court further pointed out that the statute did not restrict in any way the non-signer's disposition of his own property but only his use of trade-marks, brands or names symbolizing goodwill owned by others, the non-signer being free to sell at any price he pleases so long as he does not utilize the goodwill of others for the purpose (299 U. S. at p. 195).* The Court held that under such circumstances a

* The petition (p. 12) quotes a passage from the dissenting Judge below which might give the erroneous impression that the Federal Food, Drug and Cosmetic Act prohibits the sale of drugs without the manufacturer's trade-mark or name appearing thereon. The Act of course does no such thing. It requires only that a drug label bear the name of the "manufacturer, packer *or* distributor" (21 U. S. C. § 352(b)(1)). (Emphasis supplied throughout this brief unless otherwise noted.)

non-signer "upon every principle of fair dealing" could be treated as though he had assented; that so far as the power of the State was concerned, it was no less *constitutional* to bind such a person than to bind one who had consented by signing a contract.* The *Schwegmann* decision cast no doubt whatever on that holding.

The significance of the unanimous holding in *Old Dearborn* becomes even greater when it is realized that it was decided at a time when much state legislation regulating prices, which today would clearly be held constitutional, had been stricken down by this Court under the Fourteenth Amendment. At the time of *Old Dearborn* there still remained some vitality to the doctrine of the *Tyson* line of cases invalidating legislative price fixing.** But as this Court pointed out in *Olsen* v. *Nebraska,* 313 U. S. 236, 245 (1941), the doctrine of the *Tyson* line of cases was in reality discarded in *Nebbia* v. *New York,* 291 U. S. 502 (1934). The *Tyson, Wolff, Ribnik* and *Williams* cases have all been

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* The petition implies that *Old Dearborn* assumed non-signer enforcement to be permitted under the common law applicable to trade-marks even in the absence of a fair trade law, and then cites *Sunbeam Corp.* v. *Wentling,* 192 F. 2d 7 (3d Cir. 1951) as demonstrating the error of this premise. The *Wentling* case is wholly irrelevant here. The argument dealt with there did not relate to a fair trade statute. It was an argument that the trade-mark owner had a common-law right, *apart from any fair trade statute,* to enjoin resale by a non-signer of its trade-marked goods at less than minimum prices prescribed by it. *Old Dearborn* and the decision below do not rest upon any such common law right but upon rights created by the fair trade statutes; but they point to the fact that the fair trade laws are limited to trade-marked and branded merchandise, and are designed to enable the owner of the trade-mark or brand to protect the goodwill incident thereto, as considerations demonstrating the reasonableness of such statutes from a constitutional standpoint.

** *Tyson & Brother* v. *Banton,* 273 U. S. 418 (1927); *Wolff Co.* v. *Industrial Court,* 262 U. S. 522 (1923); *Ribnik* v. *McBride,* 277 U. S. 350 (1928); *Williams* v. *Standard Oil Co.,* 278 U. S. 235 (1929).

overruled and are no longer part of our federal constitutional law.*

Contrary to the petitioners' claim, fair trade does not eliminate price competition. The express statutory provision that a fair traded commodity must be found by the court to be in fair and open competition requires competition with products of other manufacturers in price as well as otherwise. In the present case the existence of such competition was both admitted by the petitioners and found by the court. Competition furnishes a far more effective check against arbitrary prices than any administrative agency could provide.** As the Court below said (R. 123-124):

> "* * * It was, we think, within the province of the legislature to assume that economic laws constitute a sufficient restraint against capricious or arbitrary price fixing by the producer. As pointed out long ago by Louis D. (later Mr. Justice) Brandeis, the producer 'establishes his price at his peril—the peril that if he sets it too high, either the consumer will not buy or, if the article is, nevertheless, popular, the high profits will invite even more competition'."

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* In addition to the *Nebbia* and *Olsen* cases, see *Lincoln Union* v. *Northwestern Co.*, 335 U. S. 525, 535-6 (1949), and *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 400 (1937).

** The petitioners' claim that the fair trade laws lack "standards" or "safeguards" ignores the express statutory provisions. These define with particularity: (a) the type of commodity covered (only one bearing the producer's trade-mark, brand or name and then only if sold with the use of the producer's trade-mark, brand or name); (b) the requirement of competition (i.e., that the commodity be in fair and open competition with commodities of the same general class produced by others); (c) the persons against whom fair trade prices may be enforced (only persons who have contracted to that effect or persons who have acquired the commodity with full knowledge of the minimum price restriction and then wilfully and knowingly disregard it); and (d) carefully specified exceptions with respect to closing-out sales, damaged goods and sales pursuant to court order and also with respect to prices established by so-called "horizontal" agreements between producers, between wholesalers or between retailers.

B. The Uniformity of the Court Decisions Upholding Fair Trade Acts as Meeting All Constitutional Requirements Demonstrates the Absence of any Question Calling for Review.

Since the *Old Dearborn* decision, there have been countless decisions involving various aspects of fair trade laws, including numerous attacks such as the petitioners make here. The state courts (including the highest courts of fifteen states) have time and again, both before and since the *Schwegmann* case, held fair trade laws free of constitutional infirmity.* These cases have consistently

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* CALIFORNIA: *Max Factor & Co.* v. *Kunsman*, 5 Cal. 2d 446, 55 P. 2d 177 (1936), *aff'd*, 299 U. S. 198 (1936); CONNECTICUT: *Burroughs Wellcome & Co.* v. *Johnson Wholesale Perfume Co.*, 128 Conn. 596, 24 A. 2d 841 (1942); DELAWARE: *Klein* v. *National Pressure Cooker Co.*, 64 A. 2d 529 (Del. 1949); ILLINOIS: *Seagram-Distillers Corporation* v. *Old Dearborn Distributing Co.*, 363 Ill. 610, 2 N. E. 2d 940 (1936) and *Joseph Triner Corporation* v. *McNeil*, 363 Ill. 559, 2 N. E. 2d 929 (1936), both *aff'd*, 299 U. S. 183 (1936); *Sunbeam Corp.* v. *Central Housekeeping Mart, Inc.*, CCH Trade Reg. Rep. ¶67,379 (Super Ct., Cook Co., Ill., 1952); LOUISIANA: *Pepsodent Co.* v. *Krauss Co.*, 200 La. 959, 9 So. 2d 303 (1942); MARYLAND: *Goldsmith* v. *Mead Johnson & Co.*, 176 Md. 682, 7 A. 2d 176 (1939); *See also Sunbeam Corp.* v. *MacMillan*, CCH Trade Reg. Rep. ¶67,451 (U. S. D. C., Md. 1953); MISSISSIPPI: *W. A. Sheaffer Pen Co.* v. *Barrett*, 209 Miss. 1, 45 So. 2d 838 (1950); NEW JERSEY: *Johnson & Johnson* v. *Weissbard*, 121 N. J. Eq. 585, 191 Atl. 873 (1937); NEW YORK: *Bourjois Sales Corp.* v. *Dorfman*, 273 N. Y. 167, 7 N. E. 2d 30 (1937); *General Electric Co.* v. *S. Klein on the Square, Inc.*, CCH Trade Reg. Rep. ¶67,443 (Sup. Ct., N. Y. Co. 1953); *General Electric Co.* v. *Masters, Inc.*, CCH Trade Reg. Rep. ¶67,382 (Sup. Ct., N. Y. Co., 1952); *aff'd*, 118 N. Y. S. 2d 927 (App. Div. 1st Dept., 1953); NORTH CAROLINA: *Eli Lilly and Company* v. *Saunders*, 216 N. C. 163, 4 S. E. 2d 528 (1939); OREGON: *Borden Co.* v. *Schreder*, 182 Ore. 34, 185 P. 2d 581 (1947); SOUTH DAKOTA: *Miles Laboratories, Inc.* v. *Owl Drug Co.*, 67 S. D. 523, 295 N. W. 292 (1940); TENNESSEE: *Frankfort Distillers Corporation* v. *Liberto*, 190 Tenn. 478, 230 S. W. 2d 971 (1950); WASHINGTON: *Sears* v. *Western Thrift Stores of Olympia, Inc.*, 10 Wash. 2d 372, 116 P. 2d 756 (1941); *Elgin National Watch Co.* v. *Druxman*, CCH Trade Reg. Rep. ¶67,498 (Wash. Super., 1953); WISCONSIN: *Weco Products Co.* v. *Reed Drug Co.*, 225 Wis. 474, 274 N. W. 426 (1937).

reached the same result as *Old Dearborn* as to the constitutionality of fair trade laws under the due process clauses of both the federal and state constitutions.

The petitioners point to the minority view adopted by the state courts of Florida, Georgia and Michigan as if these cases cast some doubt upon *Old Dearborn.** They do not. In each of these three cases, the state court rejected, in interpreting the constitution of its state, the principle enunciated by this Court as to the federal constitution in *Nebbia* v. *New York,* 291 U. S. 502 (1934) and subsequent cases. The courts in these three states have continued to adhere to the "affected with a public interest" doctrine of the overruled *Tyson* line of cases.

C. The Legislative Decision Is Final on Questions of Economic and Social Wisdom.

No principle of constitutional law has had more frequent and unequivocal expression by this Court in recent years than the principle that decisions as to the economic and social wisdom of a statute are legislative, not judicial functions. *Day-Brite Lighting, Inc.* v. *Missouri,* 342 U. S. 421 (1952); *Breard* v. *Alexandria,* 341 U. S. 622, 633 (1951); *Secretary of Agriculture* v. *Central Roig Refining Co.,* 338 U. S. 604, 619 (1950); *Lincoln Union* v. *Northwestern Co.,* 335 U. S. 525, 536-7 (1949); *Carolene Products Co.* v. *U. S.,* 323 U. S. 18, 31-32 (1944); *Olsen* v. *Nebraska,* 313 U. S. 236 (1941); *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381, 394-5 (1940); *West Coast Hotel Co.* v. *Parrish,* 300 U. S.

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* *Liquor Store* v. *Continental Distilling Corp.,* 40 So. 2d 371 (Fla. 1949); *Grayson-Robinson Stores, Inc.* v. *Oneida, Ltd.,* 75 S. E. 2d 161 (Ga. 1953); *Shakespeare Co.* v. *Lippman's Tool Shop Sporting Goods Co.,* 334 Mich. 109, 54 N. W. 2d 268 (1952).

379, 399 (1937); *Nebbia* v. *New York*, 291 U. S. 502, 537-538 (1934).

In the *Olsen* case, Mr. Justice Douglas, speaking for a unanimous Court in upholding a Nebraska statute limiting the fees chargeable by employment agencies, said (313 U. S. at pages 246-247):

> "We are not concerned, however, with the wisdom, need or appropriateness of the legislation. Differences of opinion on that score suggest a choice which 'should be left where * * * it was left by the Constitution—to the States and to Congress.' * * * In final analysis, the only constitutional prohibitions or restraints which respondents have suggested for the invalidation of this legislation are those notions of public policy embedded in earlier decisions of this Court but which, as Mr. Justice Holmes long admonished, should not be read into the Constitution. *Tyson & Brother* v. *Banton, supra,* [dissent] at p. 446; *Adkins* v. *Children's Hospital, supra,* [dissent] at p. 570. Since they do not find expression in the Constitution, we cannot give them continuing vitality as standards by which the constitutionality of the economic and social programs of the states is to be determined."

Although the petitioners verbally disclaim any request that this Court pass on the wisdom of the Louisiana Fair Trade Law or the McGuire Act, the entire petition is in essence a request that this Court do precisely that.

The petitioners argue that fair trade laws are economically unwise, that they result in "millions of consumers" paying higher prices; that they favor inefficiency rather than efficiency; that they place an independent self-employer at a "little cross-roads settlement" at the "mercy" of a "New York producer" or a New Orleans "drug chain"; that they are a threat to "constitutional democracy";

and that retailers are the ones primarily benefited,* rather than producers of trade-marked and branded commodities.** These are the same arguments which have been made to the state legislatures and which these petitioners and other fair trade opponents made at great length before the committees of Congress in opposing enactment of the McGuire Act. It was entirely proper that they should make these arguments to the legislatures and to Congress. The legislative forum was the one in which the economic and social desirability of fair trade statutes was to be determined and is the forum in which those statutes can be modified or repealed at any time if it should ever appear that they are no longer economically and socially desirable.

The petitioners present their economic views as if they were universally accepted axioms. Actually, highly qualified authorities are to the contrary. To be sure, the

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* The fact that in addition to protecting the producer's goodwill these laws benefit retailers and small businesses generally merely lends added support to the constitutionality of these laws. As the Court below said (R. 121):

> "We cannot say that the legislature was not authorized to consider distributors as in a similar position to licensees of the trademark or brand with a direct economic interest in it as regards the sales of the trademarked or branded article. Whether the distributors were to be protected, as well as the manufacturers or trademark owners, was a matter, it seems to us, addressed to legislative discretion and not subject to review by courts."

** The petitioners, in asserting that the purposes of fair trade laws do not include the protection of a producer's goodwill, in effect accuse the legislatures of Louisiana and forty-four other states, as well as the Congress, of legislative falsehood. The petitioners' assertion in this connection that "any person" can fix fair trade prices, even without the knowledge or consent of the producer who owns the trade-mark and its associated goodwill, is not only without support in the Louisiana decisions but also wholly irrelevant to the present case. It is undisputed that Eli Lilly and Company itself, whose trade-marks and name petitioners used in making sales of the character enjoined by the Court below, established the fair trade prices by direct contracts with various Louisiana retailers.

economics of the fair trade laws has long been the subject of intensive debate, but Congress and 45 state legislatures have concluded that the fair trade laws are in the public interest.

The arguments and data accepted by Congress as supporting passage of the Miller-Tydings and McGuire Acts fill many volumes. It was shown by fair trade proponents, although of course disputed by others, that the overall result of fair trade laws is to lower, not increase, prices; that the price-cutting practices condemned by the fair trade laws threaten serious injury to producers of trade-marked and branded goods and businesses generally, large and small, and lead to destructive price wars; that fair trade laws help to prevent the growth of monopoly in distribution; that such laws are an effective means of preventing unfair methods of competition deceptive to the public; that the highly visible bargains offered by price-cutters on nationally known brands are often a screen for the not-so-visible price inflation on lesser known items; that loss-leader practices take various forms, such as sales either below cost or at substantially reduced mark-ups to lure the customer into the store; that the fair trade laws contribute significantly to the country's general social welfare and are conducive to the continued existence of a large number of small independent business concerns rather than concentration of retailing in the hands of a relatively small number of large retailers; and that in various other ways such laws promote the public welfare.

The legislative bodies having resolved the economic and social debate in favor of the fair trade laws, the petitioners' arguments as to the merits of cut-rate pricing in general, and their own pricing policies in particular, are irrelevant in considering constitutionality. Where a legislative body finds the existence of a general evil requiring

remedial action, it has power to legislate generally, and it is immaterial whether or not all or any of the abuses aimed at by the statute have been engaged in by the defendant in a particular case arising under it. *North American Co.* v. *Securities & Exchange Commission,* 327 U. S. 686, 710-11 (1946); *Purity Extract Co.* v. *Lynch,* 226 U. S. 192, 201 (1912); *Smolowe* v. *Delendo Corporation,* 136 F. 2d 231 (2d Cir. 1943), *cert denied,* 320 U. S. 751 (1943); *Eli Lilly and Company* v. *Saunders,* 216 N. C. 163, 4 S. E. 2d 528 (1939).

The present petition in effect asks this Court to re-weigh the wisdom of fair trade legislation and substitute its judgment for that of the state legislature and Congress. But this Court emphatically pointed out only last year that the legislatures "have constitutional authority to experiment with new techniques" and "are entitled to their own standard of the public welfare" and that this Court does not "sit as a super-legislature". *Day-Brite Lighting, Inc.* v. *Missouri,* 342 U. S. 421, 423 (1952).

2. The Line of Cases Culminating in *Prudential Insurance Company* v. *Benjamin,* 328 U. S. 408 (1946) Has Settled the Questions which the Petition Seeks to Raise as to the McGuire Act.

The petitioners assert that the McGuire Act is either

> (a) an unconstitutional "delegation" or "surrender" of federal legislative power which offends Article I, §1 of the Constitution vesting the legislative power in Congress, the due process clause of the Fifth Amendment and the Commerce Clause; or
>
> (b) merely enabling legislation which is inoperative as to state statutes already existing when the McGuire Act was enacted.

Like so many "either or" propositions, the dilemma which the petitioners attempt to create is non-existent. Even the dissenting judge below did not take the position that the McGuire Act was unconstitutional.*

The McGuire Act does not "delegate" or "surrender" any power and does not contravene any constitutional provision. The McGuire Act is an enabling statute expressly designed to accommodate fair trade laws already existing in over forty states as well as future state statutes conforming to the same pattern. The petitioners' argument that a statute such as the McGuire Act conflicts with the constitution or is inoperative as to existing state laws is contrary to every decision that this Court has ever rendered on federal-state cooperation, and there have been many.

A. The McGuire Act Involves No "Delegation" or "Surrender" of Legislative Power.

Prior to the Miller-Tydings Act, the Sherman Act made resale price maintenance arrangements illegal as to interstate commerce. The Miller-Tydings Act, as interpreted by this Court in the *Schwegmann* case, eliminated the Sherman Act illegality as to contracts establishing fair trade prices but not as to the statutory restriction imposed on non-signers to which the Miller-Tydings Act made no reference. All the McGuire Act did was to take this further

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* The dissenting judge took the position that the case could be disposed of by dealing only with the Louisiana statute. His concluding paragraph, however, stated as a reason for invalidating the Louisiana statute that "otherwise the original Sherman Act may be whittled away by *legislative* exemptions and exceptions" (R. 138). Obviously the possibility that Congress might exercise its power to remove Sherman Act barriers to enforcement of a state law could not be a ground for invalidating the state law. On the other hand, if the statement referred to was meant to suggest that Congress lacks power to amend the Sherman Act, it is equally without foundation.

step. It repealed the Sherman Act insofar as that Act made enforcement against non-signers illegal and expressly declared such enforcement not to constitute an unlawful burden upon interstate commerce, thus giving express Congressional consent to the full operation of the state fair trade laws.

Congress did not delegate to the states either the decision as to what kind of fair trade legislation was appropriate in interstate commerce or the decision as to whether an undue burden on interstate commerce would result. Congress itself made both those decisions. Congress spelled out in detail the type of fair trade statute to which the Congressional consent was to apply by specifying the standards and safeguards contained in the existing state statutes as those which a state act must embody in order to qualify for interstate effectiveness.

In passing fair trade laws the states have not exercised federal power but state police power. It is, of course, an exercise of police power which could not operate as to interstate commerce until the Sherman Act obstacle was removed by Congress. When the McGuire Act removed that obstacle it did not "delegate" or "surrender" any federal power to the states but simply allowed the statutes enacted in the exercise of their own police power to be fully effective in accordance with their terms.

It is clear on the face of the McGuire Act that there can be no question as to due process under the Fifth Amendment. The Act does not purport to create any substantive rights or impose any obligations. It is the state fair trade statutes which create the rights and impose the obligations. In the McGuire Act Congress merely consents to the enforcement of these state-created rights and obligations.

B. The Constitutionality of the McGuire Act Under the Commerce Clause Is Clear from the Benjamin Line of Cases.

The petitioners assert that Congress is prohibited "by the force of the Commerce Clause alone" from passing the McGuire Act. The Court below properly rejected this argument as contrary to repeated decisions by this Court upholding the power of Congress to determine conclusively the extent to which various areas of interstate commerce shall be regulated by Congress or left to the states.

As the Court below pointed out (R. 124):

> "As to interstate commerce, it is now settled that the power of Congress is so plenary that it may exercise that power by permitting the states to regulate phases of interstate commerce. *Prudential Insurance Co.* v. *Benjamin,* 328 U. S. 408, 424. The most recent decision, *United States* vs. *Public Utilities Comm'n,* 345 U. S. 295, 304, indicates that, even when the subject would be a direct burden on commerce, the states may act when Congress has specifically granted permission for the exercise of state power."

Any possible question as to the power of Congress to permit the states to regulate phases of interstate commerce was settled by the decision in *Prudential Insurance Co.* v. *Benjamin,* 328 U. S. 408 (1946) where this Court upheld the McCarran Act in which Congress consented to state regulation of the insurance business throughout the United States and amended the antitrust laws to permit such regulation. And the *Benjamin* case followed a long line of Commerce Clause cases upholding Congress' power to accommodate state legislation. These include *International Shoe Co.* v. *State of Washington,* 326 U. S. 310 (1945); *Kentucky Whip & Collar Co.* v. *Illinois Central Railroad Co.,* 299 U. S. 334 (1937); *Brooks* v. *United States,* 267

U. S. 432 (1925); *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311 (1917); and *In re Rahrer*, 140 U. S. 545 (1891).

As the Court's opinion in the *Benjamin* case noted, in the entire history of this Court no act of Congress affirmatively consenting to state regulation of any phase of interstate commerce has ever been held repugnant to the Commerce Clause; on the contrary, this Court has always upheld such statutes even in situations in which the Court, prior to express Congressional consent, had held state regulation precluded by the Commerce Clause.

The petition presents no Commerce Clause question whatever calling for review by this Court.*

C. The Louisiana Fair Trade Law Falls Squarely Within the Enabling Provisions of the McGuire Act.

As an alternative to their attack on the constitutionality of the McGuire Act, the petitioners suggest that the Act is inoperative as regards the Louisiana Fair Trade Law. They argue that Louisiana has not enacted any "legislation to take advantage of the McGuire Act" (Pet. pp. 3, 14-15). This argument (evidently an afterthought as it was not made in either of the courts below) is as untenable as the petitioners' constitutional attack on the McGuire Act.

The Louisiana Fair Trade Law (enacted in 1936 and re-enacted in 1950) must be interpreted, the petitioners argue, "as having only an intrastate application" to be given a constitutional effect; the McGuire Act, if only

* The present argument of the petitioners that Congress made an improper "delegation" or "surrender" of its legislative power as to interstate commerce would have been equally applicable to the Miller-Tydings Act in which Congress permitted exactly the same state action as to signers which the McGuire Act permits to extend to non-signers; yet the *Schwegmann* case implicitly recognized the validity of the Miller-Tydings Act, merely interpreting its provisions as confined to signers.

enabling legislation, "is ineffective in itself as a grant of power over interstate commerce"; therefore, the petitioners conclude, there is no Louisiana statute which falls within the scope of the McGuire Act. This argument is refuted by the express provisions of both the McGuire Act and the Louisiana Fair Trade Law as well as by this Court's decisions in *Prudential Insurance Co.* v. *Benjamin*, 328 U. S. 408 (1946) and *In re Rahrer*, 140 U. S. 545 (1891).

As noted above, when Congress enacted the McGuire Act it had before it the more than forty state fair trade statutes, all substantially identical. It was primarily these existing laws that Congress sought to accommodate, as was made clear at the very outset of the House Committee Report recommending passage of the Act.* The McGuire Act expressly provides that its enabling provisions apply to any such statute "now or hereafter in effect in any State." The petitioners would read the word "now" out of the statute.

The petitioners, in asserting that the Louisiana statute must be regarded as having "only an intrastate application", appear to argue that the statute as enacted does not cover the petitioners' cut-price retail sales in Louisiana upon which the injunction below was based. Such an interpretation would render the statute meaningless. It would graft onto the unqualified provisions of the Louisiana statute, which cover all Louisiana sales of fair traded commodities, a proviso making it inoperative as to any retail

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* H. R. Rep. 1437, 82d Cong. 2d Sess. This Report of the House of Representatives Committee on Interstate and Foreign Commerce stated (p. 2):

> "The end result of the Supreme Court decision [in the *Schwegmann* case] has been seriously to undermine the effectiveness of the Miller-Tydings Act and, in turn, of the fair-trade laws enacted by 45 States. *H. R. 5767, as amended, is designed to restore the effectiveness of these acts* by making it abundantly clear that Congress means to let State fair-trade laws apply in their totality; that is, with respect to nonsigners as well as signers."

sales affecting interstate commerce. The Louisiana Fair Trade Law was an unqualified exercise of the state's police power with respect to these Louisiana retail sales. There is no basis whatever in the statute for arguing that it was anything less than an exercise of that power to its full extent. Until the Sherman Act barrier was removed by Congress, the full effectiveness of this exercise of police power was of course impeded; but that barrier no longer exists since the McGuire Act and there is no basis for suggesting that the state statute requires reenactment to be effective.

In re Rahrer, 140 U. S. 545 (1891) is precisely in point. In that case, this Court upheld the Wilson Act by which Congress had removed the interstate commerce barrier to state regulation of liquor. A great many of the state liquor statutes, including the Kansas statute involved in the case, were existing laws at the time Congress passed the Wilson Act. Prior to passage of the Wilson Act, these state laws had been held by this Court to be inoperative as to liquor imported into these states in interstate commerce. In the *Rahrer* case, the question was raised whether the Wilson Act enabled the pre-existing Kansas statute to affect liquor in interstate commerce although theretofore it could not. In holding that it did, this Court said (140 U. S. at page 565):

> "This is not the case of a law enacted in the unauthorized exercise of a power exclusively confided to Congress, but of a law which it was competent for the State to pass, but which could not operate upon articles occupying a certain situation until the passage of the act of Congress. That act in terms removed the obstacle, and we perceive no adequate ground for adjudging that a reenactment of the state law was required before it could have the effect upon imported which it had always had upon domestic property."

The *Benjamin* case is also in point. In that case, the state statute as to insurance had been passed in 1942; the federal McCarran Act enabling such state legislation to be effective was not passed until 1945. Yet this Court gave the state statute the full effect permitted to it by the McCarran Act.

3. The Petitioners' Argument that the Louisiana Fair Trade Law and the McGuire Act Contain Contradictory and Self-defeating Language Has No Merit and In Any Event Presents No Question Warranting Review by This Court.

The petitioners suggest by a question, but do not seriously argue, one additional point: that the "market effect" of permitting fair trade enforcement against non-signing retailers is just as bad as if such retailers agreed upon minimum prices among themselves, and since the Louisiana Fair Trade Law and the McGuire Act leave the anti-trust laws operative against *agreements* between retailers, the anti-trust laws should also remain operative to prevent enforcement of fair trade prices by manufacturers against non-signing retailers.

This is simply a renewal of an argument made to the state legislatures and Congress. The legislative bodies were urged not to authorize non-signer enforcement on this very ground. But the Louisiana Legislature and Congress did not accept this view as to the economics of fair trade and therefore continued the ban on agreements between retailers while expressly authorizing the enforcement by manufacturers against non-signing retailers of fair trade prices established by vertical agreements between manufacturers and other retailers.

There is, of course, no claim that any horizontal agreement is involved in the present case. The only agreements involved are vertical agreements between the respondent, Eli Lilly and Company, and various Louisiana retailers.

The Court below properly rejected the petitioners' argument, stating (R. 125):

> "Appellants' argument would render the statutes meaningless as to non-signers. The intention of Congress and the intention of the Louisiana Legislature are clearly that restrictions on the non-signers, when imposed as the result of a contract between a producer and a distributor, are to be given effect."

Conclusion.

The petition raises no question which has not been settled by this Court and should be denied.

Respectfully submitted,

EVERETT I. WILLIS,
HARRY MCCALL, JR.,
ROSS REID,
Counsel for Respondent.

Dated: September 8, 1953.

Office - Supreme Court, U.
FILED
OCT 31 1953
HAROLD B. WILLEY, Cl

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 248

SCHWEGMANN BROTHERS GIANT SUPER MARKET, ET AL.,

Petitioners,

versus

ELI LILLY & COMPANY,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

JOHN MINOR WISDOM,
SAUL STONE,
PAUL O. H. PIGMAN,
EDWARD B. BENJAMIN, JR.,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES.

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Schwegmann Brothers Giant Super Market, a commercial partnership composed of John Schwegmann, Jr., Paul Schwegmann, Wilfred I. Meyer, Anthony Schwegmann, Charles Acquisapace, Ernest Barrios, and O'Neil Barrios, and the individual partners, pray that this Court grant rehearing of its order of October 19, 1953, denying the petition for a writ of certiorari, 22 LW 3104, and that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit (205 F.2d 788) in the above case, as prayed for in the original petition herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

The status of fair trade price fixing today is a legal enigma wrapped in a mystery. Confusion is now worse confounded.

Since the adoption of the McGuire Act, fair trade litigation has proliferated.[1] Rulings have shown no consistent pattern. Some courts have upheld price fixing imposed on non-contracting merchants. Some have not. The recent trend, before and after the McGuire Act, has been against fair trade price fixing.[2]

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[1] See, e.g., Sunbeam Corp. v. MacMillan, CCH Trade Reg. Rep. ¶ 67,451 (U.S.D.C. Md. 1953); Sunbeam Corp. v. Payless Drug Stores, CCH Trade Reg. Rep. ¶ 67,492 (U.S.C.D. Cal. 1953); Shakespeare Co. v. Lippman's Sporting Goods Co., 334 Mich. 109, 54 N.W.2d 268 (1952); Hoffman-LaRoche, Inc. v. Weissbard, 11 N.J. 541 (1953); Grayson-Robinson Stores, Inc. v. Oneida, Ltd., 75 S.E. 2d 161 (Ga. 1953), *cert. den. sub nom.* Oneida. Ltd. v. Grayson-Robinson Stores, Inc., 22 LW 3088 (U.S. 1953); Cal-Dak Co. v. Sav-on Drugs, 254 P.2d 497 (Calif. 1953); Calvert Distilling Corporation v. Robilio, CCH Trade Reg. Rep. ¶ 67,540 (Tenn. 1953), rehearing denied, CCH Trade Reg. Rep. ¶ 67,578 (Tenn. 1953); Federal Cartridge Corp. v. Helstrom, CCH Trade Reg. Rep. ¶ 67,366 (Ore. Cir. 1952); Sunbeam Corp. v. Central Housekeeping Mart, Inc., CCH Trade Reg. Rep. ¶ 67,379 (Ill. Super. 1952); Seagram-Distillers Corp. v. Block, CCH Trade Reg. Rep. ¶ 67,381 (Md. Cir. 1952); General Electric Co. v. S. Klein on the Square, Inc., CCH Trade Reg. Rep. ¶ 67,443 (N.Y. Sup. 1953); Raxor Corp. v. Goody, CCH Trade Reg. Rep. ¶ 67,462 (N.Y. Sup. 1953); Elgin National Watch Co. v. Druxman, CCH Trade Rep. ¶ 67,498 (Wash. Super. 1953); Lionel Corp. v. Grayson-Robinson Stores, Inc., CCH Trade Reg. Rep. ¶ 67,529 (N. J. Super. 1953).

[2] Prior to the McGuire Act, courts of last resort in Florida and Michigan held state nonsigner clauses invalid. Seagram-Distillers Corp. v. Ben Greene, Inc., 53 So. 2d 235 (Fla. 1951); Shakespeare Co. v. Lippman's Sporting Goods Co., 334 Mich. 109, 54 N.W.2d 268 (1952); *cf.* Liquor Stores(Inc. and Webb's City, Inc. v. Continental Distilling Corp., 40 So.2d 371 (1949), holding a prior Florida fair trade law unconstitutional. Since the McGuire Act, courts of last resort in Georgia and Tennessee have held fair trade unenforceable. Grayson-Robinson Stores, Inc. v. Oneida, Ltd., 75 S.E.2d 161 (Ga. 1953), *cert. den. sub nom.*. Oneida, Ltd. v. Grayson-Robinson Stores, Inc., 22 LW 3088 (U.S. 1953); Calvert Distillers Corporation v. Robilio, CCH Trade Reg. Rep ¶ 67,540 (Tenn. 1953) (interstate transactions), rehearing denied, CCH Trade Reg. Rep. ¶ 67,578 (Tenn. 1953). A lower New Jersey court has reached the same conclusion. Lionel Corp. v. Grayson-Robinson Stores, Inc., CCH Trade Reg. Rep., ¶ 67,529 (N.J. Super. 1953).

In the public mind, this Court piled Pelion upon Ossa, confusion upon confusion, in denying certiorari. Thousands of producers, hundreds of thousands of merchants, 150 million consumers in this country had been anxiously waiting for an authoritative opinion from this Court on the constitutionality of fair trade price fixing sought to be imposed on retailers who refuse to sign fair trade contracts. Unless this case is reviewed, they must continue to wait, while retailers who have pioneered in minimum service merchandising continue to risk violating the law and subjecting themselves to damages.

October 12, 1953, this Court refused to grant a writ of certiorari in *Oneida, Ltd. v. Grayson-Robinson Stores, Inc.*[3] The practical effect was to place the Court's imprimatur on the Georgia Supreme Court's decision invalidating fair trade. One week later, October 19, 1953, this Court refused a writ in this Schwegmann case.[4] The fact that denial of certiorari "does not remotely imply approval or disapproval" of the decision of the lower court [5] compounds the confusion. For example, the Clerk of Court's ink was not dry in recording the denial of certiorari before fair traders rushed into print with claims that now all was settled. The Director of the Bureau of Education on Fair Trade, a militant lobby maintained by the National Association of Retail Druggists, principal proponent for the fair trade price-fixing movement,[6] issued a statement that "The action of the high court . . . establishes the fundamental

[3] Docket No. 166, October, 1953 term; 22 LW 3088.
[4] 22 LW 3104.
[5] Maryland v. Baltimore Radio Show, 338 U. S. 912, 919 (1950).
[6] Rose, Resale Price Maintenance, 3 Vand. L.Rev. 24, 54 (1949); FTC Report on Resale Price Maintenance (1945) xxxi, 142 *et seq.*

constitutionality of the fair trade laws."[7] This statement is, of course, incorrect since denial of certiorari carries with it no implications whatever regarding the merits of a case not reviewed. It shows, however, that denial of review makes bad matters worse. This, in an area where business men are entitled to some degree of certainty and thoughtful citizens are entitled to an explanation for the anomaly of private price fixing in a competitive economy.

Since the filing of the petition for certiorari, the Supreme Court of Tennessee has refused a rehearing in *Calvert Distillers Corporation v. Robilio.* CCH Trade Reg. Rep. ¶ 67578 (Tenn. 1953). The Tennessee Court refused originally to enforce fair trade price fixing in transactions affecting interstate commerce until this Court should pass on the McGuire Act. CCH Trade Reg. Rep. ¶ 67540 (Tenn. 1953).

Denial of certiorari, in view of such a decision as the *Robilio* case, highlights the conflict in judicial attitudes toward the validity of fair trade price fixing imposed on non-signers. Decisions of this Court cannot be reconciled. The rationale of the holding in *Schwegmann v. Calvert Distillers Corp., 341 U. S. 394* (1951) is inconsistent with the rationale of *Old Dearborn Distributing Company v. Seagram Distilling Corporation,* 299 U. S. 183 (1936).[8] The Third Circuit and the Fifth Circuit seem to have completely different views on fair trade. In *Sunbeam Corp. v. Wentling,* 192 F.2d 7 (3d

[7] N. Y. Times, October 20, 1953, p. 41, col. 1; see also N. Y. Times, October 25, 1953, p. 8E, Col. 7.
[8] See Petition for Certiorari, 10-14.

Cir. 1951), Judge Goodrich held that "Sunbeam's rights under the fair trade act against a non-signer are shown by the [first] *Schwegmann* case. There are no such rights." This holding cannot be reconciled with the holding of the Fifth Circuit in this *Schwegmann* case or, for that matter, with the *Old Dearborn* case.

There was a strong dissent in this case in the Court of Appeals. Judge Holmes disagreed with the *Old Dearborn* case on the ground that enforcement of fair trade contracts against non-signers was "lacking in due process, confiscatory and void." The district judge found that Schwegmann employed no predatory practices: "defendants simply are efficient retailers who pass on the fruits of that efficiency to the buying public in the form of lower prices"; he virtually implored the Supreme Court to reconsider its 1936 decision on the ground "that the real purpose of these [fair trade] acts is not to protect the good will of the manufacturer . . . [but] to protect the retailer from competition with another retailer who, because of his efficient merchandising methods, is able to reduce his distributive costs and consequently his retail prices."

Fair trade is over-ripe for review by this Court.

CONCLUSION.

Petitioners urge this Court to decide now—is private price fixing imposed on non-contracting retailers in transactions affecting interstate commerce consistent with responsible government, a competitive economy, and the American Constitution?

Respectfully submitted,

JOHN MINOR WISDOM,
SAUL STONE,
PAUL O. H. PIGMAN,
EDWARD B. BENJAMIN, JR.,
Counsel for Petitioners.

CERTIFICATE.

This is to certify that the foregoing petition is filed in good faith and not for purposes of delay, and is restricted to grounds specified in the provisions of this Court's Rule 33. I further certify that copies of this petition for rehearing have been served upon counsel for respondents on this ... day of October, 1953.

.....

FILED
NOV 9 1953
HAROLD B. WILLEY, C

IN THE

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The petition for rehearing makes little pretense of satisfying the requirements of this Court's Rule 33. No intervening circumstances or new grounds are stated, as the Rule requires, and of course there are none. The theme of the petition for rehearing, identical with that of the petition for certiorari, is that 150,000,000 Americans have been waiting for this Court to reaffirm once again what is already settled law.

Every case which the petitioners cite was cited in the briefs relating to the petition for certiorari. In an obviously strained effort to claim "intervening circumstances" the petitioners refer to the denial of certiorari by this Court in *Oneida, Ltd.* v. *Grayson-Robinson Stores, Inc.*, 22 LW 3090, and the denial of rehearing by the Tennessee Supreme Court in *Calvert Distillers Corp.* v. *Robilio*, CCH Trade Reg. Rep., ¶¶ 67540, 67578. Both of these state court cases were discussed in the briefs relating to the petition for certiorari

herein, and the denials of certiorari and rehearing to which the petitioners now refer occurred prior to this Court's denial of certiorari in the present case.

In the *Oneida* case the Supreme Court of Georgia held the Georgia Fair Trade Act void on the basis of the Georgia Constitution, and no review by this Court could have revived a statute thus invalidated on non-federal grounds. The decision in the *Robilio* case was not based on any rejection of the Fifth Circuit decision in the present case. The Fifth Circuit decision was not referred to in the Tennessee Supreme Court's original opinion but was called to its attention by the petition for rehearing. The Court placed its denial of rehearing on the ground that, apart from any constitutional issue, there were "a number of other reasons" why the lower Tennessee Court could not be said to have abused its discretion in denying an injunction.

The petitioners repeat the assertion, made in their petition for certiorari and shown by the respondent's brief in opposition to be without merit, that the Third Circuit decision in *Sunbeam Corp.* v. *Wentling,* 192 F. 2d 7 (3d Cir. 1951) conflicted with *Old Dearborn* and with the Fifth Circuit decision in the present case. Any possible basis for such an assertion vanishes as soon as it is realized that the *Wentling* case, like the first *Schwegmann* case which it followed, was decided before there was any McGuire Act.

The petitioners persist in their assertion that the rationale of the 1951 *Schwegmann* case (341 U. S. 384) is inconsistent with the rationale of the 1936 *Old Dearborn* case (299 U. S. 183). This was one of the principal arguments of the petitioners in their petition for certiorari. The respondent's brief in opposition analyzed the two decisions and demonstrated that they were entirely consistent. The petitioners have simply refused to recognize

that this Court in the *Old Dearborn* case did, and in the first *Schwegmann* case did not, rule on the constitutionality of fair trade legislation.

There is no reason why the petitioners should be "confused", as they claim to be, by the denial of certiorari in this case. As was pointed out in the respondent's brief in opposition, this Court had spoken unequivocally upon and settled every question presented by the petition. Numerous decisions from *In re Rahrer* in 1891 and *Old Dearborn* in 1936 to *Prudential Insurance Co.* v. *Benjamin* in 1946 had definitively established the constitutionality of both the Louisiana Fair Trade Law and the Federal McGuire Act. Recognition of that fact should dispel the petitioners' "confusion".

Actually, the petitioners are not confused by this Court's action but simply in disagreement with it. They now concede (p. 5) that even the dissenting opinion below was based merely on disagreement with this Court.

The petition for rehearing should be denied.

Respectfully submitted,

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Dated: November 6, 1953.